No. 09-16564

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DON ADDINGTON, JOHN BOSTIC, MARK BURMAN, AFSHIN IRANPOUR, ROGER VELEZ, and STEVE WARGOCKI, representing themselves and as representatives of the class, and all others similarly situated in the class,

Plaintiffs-Appellees,

v.

US AIRLINE PILOTS ASSOCIATION,

Defendant-Appellant,

and

US AIRWAYS, INC.,

Defendant.

Appeal from the United States District Court District Of Arizona
No. C08-1633 & C08-1728 (consolidated) NVW

APPELLANT'S RESPONSE TO "PETITION FOR CLARIFICATION"

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SUMMARY.

Plaintiffs claim this Court's decision requires a clarification because, they say, it is not clear whether their "damage claim" has also been dismissed. But the panel's judgment is clear and requires absolutely no clarification, and its opinion overlooks or misapprehends no point of law or fact. Plaintiffs brought an unripe claim because they sought equitable and legal remedies over a contract seniority term not yet written, not yet negotiated, and not yet ratified. Consequently this Court's ruling was quite specific:

> Although considerable time, effort, and expense have been devoted to the merits of Plaintiffs' **DFR claim** before both this Court and the district court, we are without jurisdiction to address the merits of **the claim** unless it is ripe.

(*Slip Op*., 8005) (emphasis added). That ruling applies to the *entire action*, which it is undisputed consists of a single "DFR claim," just as this Court noted (*Slip Op*., 8005); (*see also*, DktEntry: 7074777 at p. 17, describing Count III with references to the district court docket). And also as noted, the unripe DFR claim sought remedies consisting of *both* "damages and injunctive relief." (*Slip Op*., 8004).

For reasons well articulated in the majority opinion, and long urged by USAPA throughout the course of this litigation (3ER516-539; 3ER490-491; 3ER457-45; DktEntry: 6849726, p. 14-19), this Court concluded that:

> [T]his case presents contingencies that could prevent effectuation of USAPA's proposal and the accompanying **injury** ... Because these contingencies make the claim speculative, the issues are not yet fit for

> judicial decision.

(*Slip Op.,* 8006) (emphasis added). Now, plaintiffs merely re-argue their case and do so on legally frivolous grounds because the holding is crystal clear that *any* federal court lacks jurisdiction over *any* part of their DFR claim:

> [W]e hold that Plaintiffs' DFR claim is not ripe; therefore, the case is **REMANDED** to the district court with directions that the action be **DISMISSED**.

(*Slip Op.*, 8014).

That the entire "action be dismissed" is not a point that requires clarification, because without jurisdiction there is no choice but to dismiss, just as this Court noted: "we are without jurisdiction to address the merits of the claim unless it is ripe." (*Slip Op.,* p. 8005 (*citing S. Pac. Transp. Co., v. City of L.A.*, 922 F.2d 498, 502 (9th Cir. 1990)). Indeed, this fundamental point is echoed in a Supreme Court case, *Steel Co. v. Citizens*, 523 U.S. 83 (1998), which was mis-cited by plaintiffs:

> This conclusion [rejecting 'hypothetical jurisdiction'] should come as no surprise, since it is reflected in a long and venerable line of our cases. 'Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, *the only function remaining to the court is that of announcing the fact and dismissing the cause*.'

Steel Co., 523 U.S. at 94 (*citing Ex parte McCardle*, 7 Wall. 506, 514, 19 L. Ed. 264 (1868)) (emphasis added).

Rule 12(h)(3) of the Federal Rules of Civil Procedure is just as explicit and makes the point (lost on plaintiffs) that the *timing* of the determination of a lack of

jurisdiction is immaterial:

> If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.

As further evidence that timing is immaterial, the Ninth Circuit has made clear that "ripeness may [even] be raised and considered for the first time on appeal, including *sua sponte*." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1119 (9th Cir. 2009). Hence, in their petition plaintiffs can advance no argument or authority that could conceivably allow a federal court to adjudicate a damages remedy stemming from a claim over which it has no jurisdiction.

Yet the very premise of plaintiffs' petition is that this Court should provide a "clarification as to whether the Court intended to dismiss *those claims* as well." (Pet., p. 2). That seeks a legally impossible result – damages without liability. Plaintiffs also misstate the record because any reference to "those claims" is wholly inaccurate. There is but one claim that makes up this action – an alleged (and unripe) breach of the duty of fair representation. Therefore, the entire premise of plaintiffs' petition is misplaced, because it asks this Court to clarify what it "intended" to dismiss. However, this Court has already ruled, in no uncertain terms, that there is no ripe claim and the *entire action should be dismissed*. There is simply nothing to clarify.

And this can hardly come as a surprise to plaintiffs. Plaintiffs' lead counsel was specifically advised by the district court, on February 9, 2010, in a hearing on

a motion to stay the damages portion of the trifurcated litigation pending this Court's consideration of the expedited appeal, that:

> Well, what if the Court of Appeals rules that there was no ripe case here ever and vacates my merits judgment. *There wouldn't have been any point to make these other determinations, correct*?

(Tr. Feb. 9, 2010 at 5:22) (emphasis added). Plaintiffs did not dispute the district court's interpretation.[1] Therefore, in the order that followed, which stayed the damages portion of this case, the district court specifically found that:

> The **parties agree** that if the Ninth Circuit reverses the July 17, 2009 partial judgment and permanent injunction, the pending [damages-related] motions will be moot.

(Doc. 637, p. 2:6) (emphasis added). It therefore should have come as no surprise to anyone that on the same day this Court issued its decision, the district court immediately denied all pending damages-related motions on the following grounds:

> By decision this day the Court of Appeals ruled that **this action** should be dismissed for lack of ripeness *Addington v. US Airline Pilots Association*, No. 09-16564 (9th Cir. June 4, 2010). In light of that decision, the pending motions that have been stayed pending that appeal will be denied without prejudice to re-urging the motions … in the event the final mandate of the Court of Appeals differs from today's decision.

(Doc. 641, p. 1) (emphasis added). While the district court's denial was without prejudice, that allowance was qualified only in the "event the final mandate of the

[1] Rather, plaintiffs consistently took the position that there was no merit to USAPA's lack of ripeness argument or appeal. (Doc. 602, p. 4; Doc. 624, p. 23).

Court of Appeals differs from today's decision" (*Id*. at 2) – not because there was any ambiguity about what the decision required.[2]

An analysis of plaintiffs' petition offers further demonstration that there is no non-frivolous argument to 'clarify' that they may seek damages for an unripe claim in an action without subject matter jurisdiction.

ARGUMENT.

1) Plaintiffs' "Background" Misstates the Record and Requires Correction.

In section II (p. 2) of their petition, plaintiffs misstate the record in two respects:

First, by asserting a "legal basis for their damages *claims*," because it creates the false impression that plaintiffs amended their complaint to plead claims they never did. In fact, plaintiffs merely amended the allegations in Count III, the very same DFR claim found not to be ripe by this Court, to advance a new "theory" of damages. (Doc. 624, p. 15:6); (*See* Doc. 612. at ¶¶ 120-155, ¶¶ 156-161, ¶¶ 162-164). The new theory was an attempt to escape the observation made by the district court prior to trial that because it was entirely speculative when a new contract should be negotiated, "we could end up in a situation where a damage claim could fail later on entirely even though a liability claim and injunctive relief

[2] The possibility that the final mandate could change results from the separate *en banc* petition, not the current petition.

of some sort is granted here." (Trial Tr. 1056:19 to 1057:6). The new theory was fatally flawed, however. It required finding USAPA liable for actions *before it ever represented any employees* thus before it owed any duty to fairly represent. It also attempted to find *individual pilots liable* for a breach of the duty that only unions owe. And, USAPA had *no fact role whatsoever* in causing any delay in ALPA's negotiations before USAPA was certified as the bargaining representative. As USAPA pointed out, the new theory flatly violated established precedent in this circuit and elsewhere and required dismissal. (Doc. 620-1). In addition, as this Court noted, plaintiffs voluntarily waived any claim based on delay in negotiating a contract. (*Slip Op*., fn. 2).[3]

Second, plaintiffs misstate the record by claiming "the district court held its motion to dismiss ... while this Court decided the merits of USAPA's *appeal of the injunction*." (Pet., 3). USAPA's appeal was not confined to the injunction. It expressly included the partial judgment of liability (Doc. 595, p. 2 recreated at 2ER57), and advanced four grounds in addition to the scope of the injunction as a basis for reversal – including lack of ripeness of the entire action (*see also* USAPA's main brief, DktEntry: 7074777, p. 18-58).

[3] Just as plaintiffs, on behalf of the entire class they purport to represent, abandoned their Counts I and II against the company, when they voluntarily declined to pursue arbitration of their class action grievance, as allowed by the district court. (2ER185-188).

2) The Claim that the "Nature of the Damages Claims [*sic*] Does Not Raise Any Ripeness Concerns", Is Misleading and Specious.

In section III A (p. 4) of their petition, plaintiffs begin with the misleading statement that this "Court *held* that the case was not ripe for injunctive relief ..." (Pet., p. 4, *citing Slip. Op.,* p. 8007-08). This is misleading because while the Court's comment that the district court "cannot fashion a remedy that will alleviate Plaintiffs' harm ..." follows a comment about the injunction, the *holding* of this Court was not expressly or impliedly limited to injunctive relief. To the contrary, the holding, found at *Slip. Op.* 8014, directs the entire "action be dismissed."[4] *See Rogers v. Hill*, 289 U.S. 582, 587-88 (1933) (contrasting a decision from the Ninth Circuit that remanded an interlocutory appeal from an injunction with an open mandate to act "in accordance with this decree" – with an unequivocal mandate "intended to direct dismissal").

Plaintiffs then go on to make the specious argument that the damage portion of their DFR claim "does not raise any ripeness concerns." (Pet., p. 4). Following this first false step, plaintiffs contend that the panel should clarify its decision so that the damage portion of their DFR claim continues even though this Court determined there was no underlying ripe DFR claim. However, a simple comparison of how the plaintiffs define their damages with how this Court's

[4] The dissent, too, raises no question about the sweep of the holding, recognizing that the majority has held "that this case will not be ripe ..." (*Slip. Op.*, 8022).

decision addressed those exact damages demonstrates that there is absolutely nothing within the panel's decision that requires clarification.[5]

In their petition for clarification, plaintiffs "explained the legal basis for their damages" (Pet., p. 2) in the following terms:

> It is quite plausible … that a Nicolau CBA would have been timely ratified and put into effect, integrating operations on or before October 2008. If so, Plaintiffs would not have been furloughed or lost Captain opportunities.

(Pet., p. 2). Yet there can be no reasonable question that the panel already addressed this *exact* argument in its June 4th decision. The panel stated:

> Plaintiffs correctly note that certain West Pilots have been furloughed, whereas they would still be working under a single CBA implementing the Nicolau Award. It is, however, at best, speculative that a single CBA incorporating the Nicolau Award would be ratified if presented to the union's membership. ALPA had been unable to broker a compromise between the two pilot groups, and the East Pilots had expressed their intentions not to ratify a CBA containing the Nicolau Award. Thus, even under the district court's injunction mandating USAPA to pursue the Nicolau Award, it is uncertain that the West Pilots' preferred seniority system ever would be effectuated.

(Slip Op., 8007). The panel's decision thus makes it abundantly clear that any DFR claim and alleged damages stemming from the theory that a single contract containing the Nicolau Award would have been implemented on a date-certain is, in this Court's own words, "at best, speculative."

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[5] Given the innate clarity of the decision with respect to this issue, it is perplexing as to why plaintiffs filed this petition for clarification – if not for dilatory or delaying motives. *See In re Becraft v USA*, 885 F.2d 547 (9th Cir. 1989) (imposing sanctions under Fed. R. App. P. 38 for frivolous petition for rehearing).

The panel's decision comports with well settled law in this Circuit and others that has established that "the ripeness doctrine seeks to separate matters that are premature for review because the injury is speculative…" *Portman v. County of Santa Clara*, 995 F.2d 898, 902 (9th Cir. 1993); *Harris v. Rave Motion Pictures Birmingham, LLC*, 564 F.3d 1301, 1308 (11th Cir. 2009) ("the ripeness doctrine protects federal courts from engaging in speculation …"); *United Transportation Union v. Foster*, 205 F.3d 851, 857 (5th Cir. 2000).

Plaintiffs have attempted to disguise their damages in an unrecognized (and invalid) theory of joint and several liability between a union and individual members stemming from conduct that allegedly occurred *before* the union was even certified. Regardless of how plaintiffs mask their alleged damages, they always come back to the theory that "a Nicolau CBA would have been timely ratified … on or before October 2008" and supposedly therefore "Plaintiffs would not have been furloughed or lost Captain opportunities." (Pet., p. 2). The conjecturable nature of this theory was plainly addressed by this Court – properly deemed "speculative" – and dismissed as unripe by the panel decision. There is nothing left to clarify, hence plaintiffs merely re-argue what has been decided in a decision deemed warranted for publication as controlling precedent.[6]

[6] The Ninth Circuit document entitled "Information Regarding Judgment and Post-Judgment Proceedings" specifically advised counsel to "not file a petition for panel rehearing merely to reargue the case." (DktEntry 46-2).

3) The Claim that Jurisdiction and Merits Are Intertwined and Therefore the "Damages Claims" [*sic*] Cannot Be Dismissed, Is Misplaced and Immaterial to the Opinion or Its Holding.

In section III B (p. 7) of their petition, plaintiffs claim that this Court is without authority to dismiss this case for lack of jurisdiction over a claim that it finds not ripe because, they say, the merits of the damages remedy of their claim is too intertwined with the question of jurisdiction. In all the challenges on ripeness grounds brought by USAPA before the district court and then before this Court, plaintiffs have never raised this argument.[7] Now when they make it they do not even attempt to explain, nor could they, how their claim is so intertwined. A blanket assertion (Pet., p. 7) is not sufficient.[8]

Plaintiffs would have this Court stand the jurisdictional prerequisite on its head. Under plaintiffs' theory, a federal court lacking in ripeness or Art. III jurisdiction would be required to take a case to decide the merits. But

[7] It is improper for plaintiffs to raise arguments in their post-judgment petition that were never raised at the district court or during the briefing and argument process of this Court. *See, e.g., Squaw Valley Development Co. v. Goldberg*, 395 F.3d 1062, 1063 (9th Cir. 2005) (rejecting argument "because it is made for the first time in the petition for rehearing"); *Picazo v. Alameida*, 366 F.3d 971, 971-72 (9th Cir. 2004) (refusing to consider argument on petition for rehearing where issue had been raised "at no point in th[e] litigation"); *Talk of the Town v. Dep't of Finance and Business Servs.*, 353 F.3d 650, 650 (9th Cir. 2003) (refusing to consider argument raised on petition for rehearing "for the first time ever").

[8] Indeed, the question of whether a claimant has sued before a union has acted will seldom require consideration of whether that act was in fact arbitrary, in bad faith or discriminatory. Here, the act is the final product of bargaining, and what may or may not go into it is not necessary to answer the question of whether there *is or is not* a final product.

consideration of the merits *when they are truly intertwined* is proper not to decide the merits but rather to decide whether the court has jurisdiction in the first place. *See e.g.*, *Safe Air for Everyone v. Meyer*, 373 F.3d 1035 (9th Cir. 2004) (whether grass residue was "solid waste" under the federal Resource Conservation and Recovery Act was a jurisdictional fact in dispute). This Court did that analysis already. After a thorough review of the record and of the law, this Court did not find the merits intertwined with the ripeness question (nor did plaintiffs argue this in brief or in oral argument).[9] That the plaintiffs would now recast their cause of action into two claims to create the unjustified implication that the Court has not considered the "damages claim" makes no difference whatsoever because this Court has already found there is but one claim and it is unripe.[10]

Ignoring this, plaintiffs illogically assert that, "the Court cannot dismiss the named plaintiffs' damages claims [*sic*] as invalid while also finding a lack of ripeness ... rather, before the Court can address the merits of the damages claim, it must find these claims [*sic*] are ripe." (Pet., p. 8). However, in the context of addressing ripeness, an appellate court "need not decide whether this claim is valid, or even whether a claim is presented at all." *Poland v. Stewart*, 117 F.3d

[9] *See supra*, p. 10, fn. 7.

[10] Nor does the dissent take a different view. Indeed, it agrees with the majority on the "general rule" arguing only for an unprecedented, special exception. (*Slip. Op.* fn. 4).

1094, 1104 (9th Cir. 1997). Rather, the proper inquiry, which was made by the panel, is "whether an issue is ripe for review, in order to ensure that proper subject matter jurisdiction exists to hear the case. *Id*. (*citing Hawaii Newspaper Agency v. Bronster,* 103 F.3d 742, 746 (9th Cir. 1996)).

The panel's decision properly pointed out at the beginning of its analysis that if the claim is not ripe then it is "without jurisdiction to address the merits," and the only permissible response to an unripe claim is, "we must dismiss." (*Slip. Op*., 8005).

4) <u>The Claim that the Court Cannot "Decide the Merits of the Damages Claims" [*Sic*], Is Inapposite Because the Sole Claim in the Action Has Been Dismissed for Lack of Jurisdiction</u>.

In section III C (p. 9) of their petition, plaintiffs argue for the first time that this Court lacks jurisdiction over the appeal because the "district court has not addressed the merits of the ... damages claims" and therefore this Court "cannot decide the merits of the damages claims on appeal." This is mere sophistry.

First, the law is well settled that an appeal from an order granting an injunction brings the entire case before the Court, not merely the propriety of the injunction.[11] *See e.g.*, *MAI Sys. Corp. v. Peak Computer, Inc*., 991 F.2d 511 (9th Cir. 1993), *cert. denied*, 510 U.S. 1033 (1994); *Burlington R.R. Co. v. Dept. of*

[11] Noting that the scope of appeal did more than that, however, because it was taken from a partial final judgment and included all prior pre-trial, trial, and post-trial rulings identified by appellant.

Rev., 934 F.2d 1064, 1071 (9th Cir. 1991). Also settled is that on an interlocutory appeal from an injunction any issue that is "inextricably bound up" with the injunction is reviewable. *See e.g.*, *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 987 (9th cir. 2001), *cert. denied*, 536 U.S. 959 (2001); *State of Cal. v. Campbell*, 138 F.3d 772, 776 (9th Cir. 1998), *cert. denied*, 525 U.S. 822 (1998). Not even plaintiffs argue an injunction can issue from a court lacking in jurisdiction.

Second, as indicated, there is only one claim, and this Court has found it unripe. If there is no jurisdiction, then consideration of any merits is not relevant.

Third, while this Court has commented on the merits, it has not *judged* them (*Slip. Op.*, 8005) hence it is not accurate to imply that this Court has "decided" the merits.

Fourth, although the district court had not yet ruled on USAPA's motion to dismiss the damages claim (until after this appeal), equally true is that it *had* ruled on USAPA's early and oft repeated argument that the DFR claim, upon which damages rested, was not ripe – thus the issue *was raised* at the trial court level. (Doc. 84 at 3ER516; Doc. 104 at 3ER490; Doc. 253 at 3ER457; Doc. 427 at 2ER259;Doc. 593 at 1ER4).

5) <u>The Court Has No Obligation to Mind Plaintiffs' Litigation Strategy or Cure its Failings, and it Is Improper to Request the Court Do So.</u>

In section III D (p. 10) of their petition, plaintiffs abandon any pretense of stating with particularity any point of law or fact overlooked or misapprehended.

Instead, they simply complain that the Court should have ruled so as to "not apply" the law to create the "risk" that their "claims would be untimely on refilling [*sic*]." (Pet., p. 11). But this Court does not sit to advise plaintiffs on their litigation strategy or tend to their claim.[12] This Court correctly ruled that because the case plaintiffs chose to bring was unripe, no court has jurisdiction over it.

Moreover, plaintiffs are not entitled to assume they have any claim to 're-file' and they grossly misread the opinion in doing so. Hence their concern, even if it were proper for this Court to entertain, is immaterial. As this Court indicated, any claim brought after a new contract is ratified, and hence then presumably ripe, can only be directed at the final product: "only after negotiations are complete" and a "final product" has been reached." (*Slip Op.* 8010). The theory of plaintiffs' current unripe claim is that USAPA's intention not to, or its failure to, implement a predecessor union's (ALPA) bargaining position (arrived at through the predecessor's internal process)[13] violates a successor union's duty of fair representation. But this theory finds no purchase in the opinion. The very heart of the Court's ripeness analysis is that because there is no contract language as of yet, there cannot even be the possibility of an injury ("plaintiffs have not identified a

[12] That the district court did so (6ER1116:16-1117:5; 6ER1131-1136) was plainly improper.

[13] Plaintiffs' *en banc* petition misstates the record by calling ALPA's internal process a "federally mandated arbitration." As this Court found, it was merely "the product of the internal rules and processes of ALPA." (*Slip Op.*, fn 3).

sufficiently concrete injury" *Slip. Op.*, 8008; so the Court is "not faced with" a "manifested" "concrete injury" *id.*, 8012). And:

> We conclude that this case presents contingencies that could prevent effectuation of USAPA's proposal and the accompanying injury. At this point, neither the West Pilots nor USAPA can be certain what seniority proposal ultimately will be acceptable to both USAPA and the airline as part of a final CBA (*Slip Op.*, 8006);
>
> Not until the airline responds to the proposal, the parties complete negotiations, and the membership ratifies the CBA will the West Pilots actually be affected by USAPA's seniority proposal – *whatever USAPA's final proposal ultimately is*. (*Id.*, 8007);
>
> USAPA's final proposal may yet be one that does not work the disadvantages Plaintiffs fear, *even if that proposal is not the Nicolau Award*" (*Id.*, 8008);
>
> USAPA is at least as *free to abandon the Nicolau* Award as was its predecessor ... (*Id.*, fn 3). (emphasis added).

CONCLUSION.

Plaintiffs' petition, adorned as it is with misrepresentations, inapplicable citations, and sophistry, makes frivolous arguments directed at the same issue, ripeness, already argued, already ruled on. It seeks not to clarify the decision but rather to "amend" (Pet. p. 12) it into a reversal, from an unripe action into a ripe action, from remanding for dismissal into remanding for prosecution. It appears calculated to delay issuance of the mandate notwithstanding the "considerable time, effort, and expense" (*Slip. Op.*, 8005) that prosecution of plaintiffs' unripe claim has caused all parties to date. Delay in issuance of the mandate can only

prolong the "present impasse" (*Slip Op*., fn. 1), and further prevent USAPA from doing exactly what the decision frees it to do, bargain to a "final product" that will address this seniority conflict once and for all in its proper forum, at the bargaining table.

For the foregoing reasons, USAPA respectfully requests that the Court deny the petition.

DATED: June 28, 2010 Respectfully submitted,

s/ Nicholas Granath, Esq.
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CERTIFICATE OF COMPLIANCE.

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer is: (check applicable option)

__**X**__Proportionately spaced, has a typeface of 14 points (Times New Roman) and contains 3582 words (petitions and answers must not exceed 4,200 words or 390 lines of text).

or

____ Monospaced, has 10.5 or fewer characters per inch and contains _ words or __ lines of text (petitions and answers must not exceed 4,200 words or 390 lines of text).

or

____ In compliance with Fed. R. App. 32(c) and does not exceed 15 pages.

Date: June 28, 2010

s/ Nicholas Granath, Esq.
Nicholas Paul Granath, Esq.
Attorney for Appellant-Defendant, the
US Airline Pilots Association

CERTIFICATE OF SERVICE.

When All Case Participants are Registered for the
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US Court Of Appeals Docket No.: **09-16564**

I hereby certify that I caused the foregoing document, its attachments and supporting documents, to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on the date indicated below, herein. I certify that all participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

DATED: June 28, 2010 SEHAM, SEHAM, MELTZ & PETERSEN LLP

s/ Nicholas Granath, Esq.
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